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The Dual Sovereignty Exception to Double Jeopardy: In the Wake of *Garcia v. San Antonio Metropolitan Transit Authority*

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*Evan Tsen Lee**

INTRODUCTION

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .[1]

The words seem plain enough. The average person probably feels confident that she has a solid understanding of what this constitutional provision means. And she has a right to be confident. The natural meaning of the words is that the government may not try a person twice for the same crime. It is a shock to learn that the Supreme Court has consistently interpreted the prohibition not to apply when successive prosecutions are brought by the state and federal governments.[2]

As will be examined in greater detail later, the putative justification for this rule, commonly known as the "dual sovereignty" or "separate sovereignties" exception,[3] is federalism.[4] Any sacrifice in protections for individual defendants, any loss of judicial credibility that stems from the Supreme Court's insistence on this stunningly counterintuitive doctrine, is simply the "price we pay" for the maintenance of our constitutionally mandated federal system.[5] It is as if

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1. U.S. CONST. amend. V.

2. *See* Barkus v. Illinois, 359 U.S. 121 (1959) (subsequent state prosecution); Abbate v. United States, 359 U.S. 187 (1959) (subsequent federal prosecution).

3. *See, e.g.*, Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Barktus v. Illionis *and* Abbate v. United States, 14 W. RES. L. REV. 700 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967).

4. *See infra* note 36 and accompanying text.

5. *Id.*

the Supreme Court is saying that no matter how much we value individual autonomy, no matter how much we prefer easily understood constitutional interpretations, federalism requires that states have the right to prosecute accused criminals within their jurisdictions, regardless of whether those defendants have previously been prosecuted.[6]

The argument that federalism compels the dual sovereignty exception to the double jeopardy prohibition is certainly plausible. After all, if there are such things as "essential attributes" of state sovereignty, the prosecution of intraterritorial crimes would have to be considered among them. At the same time, however, one wonders whether other, less metaphysical considerations underlie the maintenance of the dual sovereignty exception as well. There appears to be a fair amount of judicial (or at least scholarly) handwringing over what practical consequences would flow from overruling the doctrine.[7] Coordination between federal and state prosecutors is not perfect; a United States attorney may offer a quick plea bargain in a case of relatively little importance to the federal government, thereby (unthinkingly) precluding a state's attorney from taking action even if the case is of great import to the state. Or an equally unsatisfactory result may come about because of a political disagreement between prosecutors — i.e., the dreaded "race to the courthouse."[8] A sympathetic state's attorney may offer a greatly reduced charge in a murder case with racial overtones, hoping to bar a subsequent federal prosecution under the civil rights statutes.[9] There is some sentiment that, under these circumstances, the government should be afforded another opportunity to gain a conviction.

These are serious concerns. But they are not the same concerns upon which the Supreme Court has purported to rest the dual sovereignty exception. The Supreme Court has said that *federalism* is the justification for permitting some subsequent criminal prosecutions that would otherwise be precluded by the double jeopardy prohibition.

The question arises whether the courts have been entirely candid about the true rationale behind the doctrine. It is possible that federalism is the only real rationale for the dual sovereignty exception; by the same token, it is possible that the above-mentioned practical concerns are actually doing all the work. Perhaps some combination of concerns about federalism and worries about the practical consequences of overruling the doctrine are keeping the dual sovereignty exception afloat.

This whole issue of judicial honesty is purely academic, of course, so long as we have confidence in the soundness of the federalism justification. That our courts might be concealing part of the whole rationale behind the dual sovereignty exception may cause some vague discomfort, but at least we can be secure in the knowledge that we have come to the right result. The real problem arises if we lose our confidence in federalism as a justification for dual sovereignty. If

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6. This Article is not addressed to the dual sovereignty doctrine as it applies to prosecutions by foreign nations or Native American tribes, since the principle of federalism is not implicated in those cases. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978) (plea of guilty in Navajo tribal court does not bar subsequent federal prosecution).

7. *See infra* notes 122-39 and accompanying text.

8. *See infra* note 122 and accompanying text.

9. *See, e.g.*, 18 U.S.C. § 241 (1979) (proscribing conspiracy to injure, oppress, threaten, or intimidate any citizen in the enjoyment of federal constitutional rights).

federalism is shown not to require the availability of successive prosecutions — or even if the proposition is called into serious question — then one of two things must happen.

The first possibility is simple: If federalism truly is the sole rationale for the dual sovereignty exception, then the doctrine will gladly be abolished.[10] The second possibility is actually a group of possibilities. If practical concerns and federalism or practical concerns alone underlie the dual sovereignty exception, then any discovery that federalism is a faulty premise for the doctrine forces the courts to make an awkward choice. Courts must either: (1) abolish the doctrine and create different solutions to the practical problems that would ensue from an overruling of the exception; (2) retain the doctrine and admit that practical and institutional concerns sometimes justify the curtailment or elimination of constitutionally mandated individual rights; (3) retain the doctrine and admit nothing; or (4) abolish the doctrine and the practical consequences be damned. With the exception of option (3), each of these choices would seem to involve an extraordinary amount of judicial candor and/or self-discipline. Before any of these choices need be confronted, however, it must first be demonstrated that there *is* some occasion for us to doubt the soundness of federalism as a predicate for the dual sovereignty exception to the double jeopardy prohibition.

I. Double Jeopardy and the Dual Sovereignty Exception

Before scrutinizing the theoretical underpinnings of dual sovereignty, it is helpful to undertake an abbreviated examination of leading case law on the scope of the double jeopardy prohibition.

A. Scope of Double Jeopardy

The express language of the fifth amendment limits the double jeopardy prohibition to successive prosecutions for the "same offense."[11] At least five

10. This is not to imply that we should be cavalier about the overruling of constitutionally-based precedent. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2192-93 (1986) (White, J., dissenting) (erroneous constitutional decisions should be more susceptible to being overruled because "the people" cannot correct them through legislation). Perhaps Justice White's suggestion will directly or remotely renew the spirited debate about constitutional and non-constitutional *stare decisis* and the legitimacy of judicial review. For the moment, suffice it to say that Justice White's suggestion seems odd in at least two respects. First, he chose to ignore the availability of constitutional amendment to correct erroneous constitutional decisions. *See, e.g.*, Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1057-70 (1984). This omission is especially curious in light of the recent talk of overruling Roe v. Wade, 410 U.S. 113 (1973), by constitutional amendment.

Second, the idea that the presumption against overruling precedent should be accorded *less* weight where constitutional decisions are concerned seems backward. If the Supreme Court's chief role is to divine, explicate and make accessible our constitutional values, it is critical that they not be in a constant state of fluidity. "The people" learn relatively little of the legal character of particular statutes; it is the core constitutional values they come to know, rely upon, and incorporate into their *Weltanshaung*.

The dual sovereignty exception would not survive even with the aid of a stringent presumption in favor of *stare decisis* if one is persuaded that the rule has been cut loose of its substantive federalist moorings by *Garcia*.

11. The prohibition also applies to multiple punishments for the "same offense." *See Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873); North Carolina v. Pearce, 395 U.S. 711 (1969).

different tests have been suggested for determining what constitutes the same offense for double jeopardy purposes.[12]

The first potential test is the "identical statutory (or common law) offense" test. This is the crudest test — offenses are the same if, and only if, they spring from the same code section or common law rule. The "identical statutory offense" rule affords insufficient protection against successive prosecutions because, by simply restating identical or substantially similar crimes in distinct code sections, the legislature is given the power to define the scope of the double jeopardy protection. The test has long been rejected by the United States Supreme Court.[13]

The second test is the "same evidence" test, followed by a clear majority of jurisdictions, including the United States Supreme Court.[14] The "same evidence" test focuses on the similarity of the elements contained in the crimes at issue. The general rule is stated in *Blockburger v. United States*:[15]

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.[16]

The third suggested way of determining what constitutes "same offenses" is commonly known as the "same transaction" test. This inquiry concentrates on the underlying criminal conduct. The leading version of the test, proposed by Justice Brennan in a dissenting opinion in *Ashe v. Swenson*, "requires the prosecution. . . to join at one trial all the charges against a defendant that grow out of single criminal act, occurrence, episode, or transaction."[17] Under this test, the prosecution is restrained from splitting its claims in such a way that potentially subjects a defendant to a virtually endless stream of prosecutions for essentially the same course of conduct. The concept is not entirely dissimilar from that underlying the rule regarding compulsory counterclaims under the Federal Rules of Civil Procedure.[18]

Many scholars believe the "same transaction" test more faithfully vindicates the core values of the double jeopardy clause than does the "same evidence" test.[19] It should be noted that if the broader "same transaction" test were to become the majority rule, the ramifications of adopting a flat constitutional prohibition against all successive federal-state or state-federal prosecutions would be quite different than under current circumstances. Quite simply, a much larger number of subsequent prosecutions would be barred. If the "same

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12. *See* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of A Definition*, 71 IOWA L. REV. 323, 330-35 (1986). A sixth potential test, the "single intent" test, is "functionally indistinguishable" from the "same transaction" test. *Id.* at 333.

13. *See In Re Nielsen*, 131 U.S. 176 (1889).

14. *See* C. WHITEBREAD, CRIMINAL PROCEDURE § 24.04 (1980).

15. 284 U.S. 299 (1932). *See also* Gavieres v. United States, 220 U.S. 338 (1911).

16. 284 U.S. at 304 (citing *Gavieres*, 220 U.S. at 342).

17. 397 U.S. 436, 453-54 (1970) (Brennan, J., dissenting).

18. FED. R. CIV. P. 13(a).

19. *See, e.g.*, C. WHITEBREAD, *supra* note 14, at 502; Note, *supra* note 3, at 1560 n.130; Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis*, 1971 UTAH L. REV. 105, 117, 129; Vestal & Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 MO. L. REV. 1, 11-12 (1982).

transaction" test prevailed it could potentially make the Supreme Court more hesitant to overrule the dual sovereignty doctrine. But the "same transaction" test is clearly the minority rule, and there are no signs that it is about to win any greater approval in the near future.

The fourth possible method of deciding whether offenses are the same is the "necessary element" test. Under this test, offenses are the "same" if the same conduct is required to satisfy a necessary element of each crime. This test appears to lie somewhere in the middle of the conceptual ground between the "same evidence" and "same transaction" tests. It is somewhat related to the "same evidence" test in that it focuses on the enumerated elements of the subject crimes; yet it is anchored in the underlying course of conduct because only one of the elements need be identical for the prohibition to apply. It could be argued that dicta in *Brown v. Ohio*[20] and *Illinois v. Vitale*[21] have piggybacked the "necessary element" test atop the *Blockburger* "same evidence" test, but Professor Thomas has noted that more recent cases make it clear that the Supreme Court has neither accepted nor rejected the "necessary element" test.[22]

The fifth possible test for determining "same offense" is the "same interest" or "same gist" test.[23] Under this test, crimes are different if they are intended to prevent a substantially different harm or evil. As will be explored later, some commentators have suggested that the adoption of this test would solve at least one of the problems arising from any overruling of the dual sovereignty exception to double jeopardy.

B. Dual Sovereignty Exception

The dual sovereignty exception, allowing successive federal-state or state-federal prosecutions for the same offense, is as simple as it is astounding. In *United States v. Lanza*, the defendants had been convicted by a state court of "manufacturing, transporting, and having in possession liquor" in violation of a state statute.[24] Subsequently, the defendants were indicted in federal court for manufacturing, transporting, and possessing the same liquor, and for possessing a still designed for the manufacture of the liquor. The defendants filed a special plea in bar, arguing that they could not be tried a second time for the acts leading to the federal indictment, and the government demurred. The federal district court overruled the demurrer and dismissed all counts of the indictment.

The U.S. Supreme Court reversed. Writing for the Court, Chief Justice Taft stated that:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other . . . . It follows that an act denounced as a crime by both national and state sovereignties is an offense against

20. 432 U.S. 161 (1977).

21. 447 U.S. 410 (1980).

22. Thomas, *supra* note 12, at 369.

23. *See infra* notes 130-39 and accompanying text.

24. 260 U.S. 377, 382 (1922).

the peace and dignity of both and may be punished by each.[25]

Arguably, *Lanza* was a special case. The federal government's power to regulate alcoholic beverages arose from the eighteenth amendment, which explicitly stated that "[t]he Congress and the several States shall have *concurrent* power to enforce this article by appropriate legislation."[26] Theoretically, the Court could have distinguished *Lanza* in future multijurisdictional prosecution cases, saying that absent an explicit constitutional mandate for concurrent jurisdiction, the federal and state governments would be held responsible for each other's actions in the double jeopardy area.[27]

But the Court chose not to take that road. In the companion cases of *Abbate v. United States*[28] and *Bartkus v. Illinois*,[29] the Court seemingly expanded the *Lanza* rationale to all contexts. The defendants in *Abbate* had pleaded guilty in state court to a charge, of conspiracy to destroy property and had each been sentenced to three months imprisonment. Thereafter the defendants were indicted, tried, and convicted in federal court of violating the general federal conspiracy statute.[30] The defendant in *Bartkus* was acquitted in federal court of violating the statute prohibiting robbery of federally insured banks.[31] Illinois then successfully prosecuted him for violation of a garden-variety robbery statute.[32]

The Supreme Court upheld the subsequent prosecutions in both cases. In *Abbate*, the majority expressly declined to overrule *Lanza*, but the author of the Court's opinion, Justice Brennan, clearly was uncomfortable with the ramifications of the "dual sovereignty" theory. In an unusual separate opinion, Justice Brennan argued strenuously for the adoption of a "same transaction" test to determine "same offense" (in place of *Blockburger*). Apparently Justice Brennan felt that the *Lanza* dual sovereignty exception was acceptable if the Court were eventually to adopt his "same transaction" test.[33]

Writing for the Court in *Bartkus*, Justice Frankfurter too felt some reservations about holding that successive prosecutions by different jurisdictions do not violate the fourteenth amendment due process clause.[34] However, at least two considerations led the Court to uphold the subsequent state prosecution in *Bartkus*. First, the Court surveyed the historical development of double jeopardy law in the United States and its foreign analogues and concluded that precedent

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25. *Id.*

26. U.S. CONST. amend. XVIII, § 2 (emphasis added).

27. For a sound historical analysis of the dual sovereignty doctrine and the eighteenth amendment, see Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986).

28. 359 U.S. 187 (1959).

29. 359 U.S. 121 (1959).

30. 18 U.S.C. § 371 (1984).

31. 18 U.S.S. § 2113 (1984).

32. ILL. REV. STAT. ch. 38, § 501 (1951).

33. Now that it is clear that the Court will not adopt the same transaction test, one cannot help but wonder whether Justice Brennan would again vote as he originally did in *Abbate*. He dissented in *Bartkus* albeit on the ground that the federal government had effectively conducted the second prosecution. 359 U.S. at 168 (Brennan, J., dissenting).

34. *Id.* at 138 ("little sympathy" for result).

supported the continuation of the *Lanza* rule.[35] Second, and more importantly, the Court noted that there existed a "practical justification" for the reaffirmation of *Lanza* — federalism. If federal prosecutions for "relatively minor" offenses were allowed to bar subsequent state prosecutions for serious crimes,

> the result would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of states over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.[36]

Thus, the Court had made its position clear: it is chiefly *for the sake of federalism* that we must permit successive federal-state or state-federal prosecutions for the same offenses.

II. Competing Conceptions of Federalism

A. Theories of Substantive Federalism

i. Justice Frankfurter's Conception

It is critical to understand the philosophy of federalism that guides *Bartkus* and *Abbate*. The underlying assumption is that under the Constitution, the states remain "sovereign" entities. The judiciary polices federal government actions to see that they do not infringe on any of the prerogatives that appertain to sovereignty. In Justice Frankfurter's view, it was the proper role of the courts to ascertain the outer limits of state sovereignty and affirmative federal power.[37] If *Lanza* had been overruled, and successive prosecutions thereby prohibited, the federal government could have encroached upon what a majority of the Court judged to be a legitimate area of state sovereignty — the prosecution of all intra-territorial offenses. Justice Frankfurter believed that the Court's rightful place was as surveyor of the boundary between federal and state activity.

Justice Frankfurter's theory of federalism, which shall be classed as "substantive federalism," contains two key elements. First, it posits that identifiable, *substantive* areas of economic and/or social activity lie exclusively within the province of the states, and are therefore eligible for protection from the reach of federal encroachment. Second, the theory holds that it is the *judiciary* which must provide the protection. Put another way, the courts must manage federal-state relations, on the highest level, and this management is accomplished by allocating to federal and state actors substantive parcels of economic and social activity, which the actors then regulate, tax, or influence in some way.

That Justice Frankfurter subscribed to this theory of substantive federalism is made clear by his comparison in *Bartkus* of federalism to the separation of powers doctrine:

> It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation

35. *Id.* at 128-36.

36. *Id.* at 137.

37. *See infra* note 41 and accompanying text.

> of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government.[38]

Just as the boundaries among the three coordinate branches of government are policed by the judiciary, so are the boundaries between federal and state power to be umpired by the courts, in Frankfurter's estimation. Both the separation of powers doctrine and federalism were tools given to the courts by the Constitution for the purpose of preventing the centralization of government. Under any such view of federalism, of course, the courts would be derelict in their constitutional duties if they did not actively police the federal-state substantive boundaries, allocating parcels of social and/or economic activity as they went. Certainly, the federal and state governments could not be left to settle the boundaries by their own devices, any more than the executive and legislative branches could be allowed to decide amongst themselves what lawmaking and enforcement functions each would exercise.[39]

This theory of substantive federalism manifests itself in at least one other of Justice Frankfurter's opinions in the criminal procedure sphere. In *Feldman v. United States*,[40] writing for the majority, Frankfurter upheld the introduction into federal court, evidence obtained from a defendant under a grant of immunity in a state grand jury investigation. This result — permitting the compulsion of self-incrimination where two "sovereignties" are involved — is as shocking as successive prosecutions for the same offense, and is made possible by recourse to the same theory of federalism as that employed in *Lanza, Bartkus*, and *Abbate*. That the theory of federalism involved in *Feldman* is one of substantive federalism is made clear by the Court's unabashed allocation of substantive parcels of permissible governmental activity, first to the states and then to the federal government. "Whether testimony in a New York court should be compelled in exchange for immunity from prosecution is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say."[41]

It is beyond question that Justice Frankfurter's allocation of authority over grants of immunity comports with traditional practices concerning the division of responsibility between the states and federal governments. Everybody understands that the New York legislature, New York prosecutors, and the New York Court of Appeals always have controlled the scope and occasion of grants of immunity in exchange for testimony in the New York courts. In that respect, the two quoted sentences from *Feldman* are most unremarkable — they do nothing more than memorialize an unwritten code of behavior among legal institutions. But it cannot escape attention that Justice Frankfurter made no mention of preemption. Suppose Congress enacted a statute establishing a uniform set of conditions under which immunity may be given in exchange for testimony, applicable not only to all federal cases, but to all state court cases whose subject matter affects interstate commerce. Under Justice Frankfurter's theory of federalism, such an enactment would unquestionably have been stricken down as

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38. *Bartkus*, 359 U.S. at 137.

39. *But see infra* notes 105-21 and accompanying text.

40. 322 U.S. 487 (1944), (overruled, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964)).

41. *Id.* at 493.

unconstitutional; it would have strayed too far across the traditional boundaries of federal-state responsibility in the criminal procedure realm. Of course, under any such theory, the U.S. Supreme Court would be the ultimate surveyor and enforcer with respect to the boundary line. This surveying function of courts is the hallmark of the theory of substantive federalism.[42]

Outside the criminal procedure field, too, Justice Frankfurter was displaying the substantive federalist colors. In *Freeman v. Hewit*,[43] decided two years after *Feldman*, the Court was faced with the constitutionality *vel non* of the Indiana Gross Income Tax Act of 1933. The appellant had argued that the tax strayed over the boundary of permissible state power under the commerce clause. Writing for the Court, Justice Frankfurter observed that such a direct tax has "always been more carefully scrutinized" than mere police power regulation.[44] He added: "The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce."[45]

Upon initial inspection, this language may not seem remarkable. After all, if Congress does not indicate its desires in a particular area touching on interstate commerce, then who else but the courts are left to settle the dispute? Of course the Court had to render a decision as between the parties at bar; that is not remarkable. What is remarkable is that the Court, led by Justice Frankfurter, took it upon itself to draw the boundary line. It could just as well have simply upheld the tax in the absence of any evidence of congressional intent to the contrary, and allowed Congress to preempt the field with subsequent legislation if it was dissatisfied with the operation of the state tax in that area. This was, in fact, the thrust of the dissent six years earlier in *McCarroll v. Dixie Greyhound Lines*,[46] an opinion joined by Justice Frankfurter.

Perhaps the clearest manifestation of Justice Frankfurter's willingness to sanction judicial activism in the area of federal-state relations appears in a work written before he ever assumed the bench.[47] Commenting on the "audacious" dormant commerce clause doctrine ushered in by the Marshall Court, Frankfurter stated:

> [The doctrine was] eventually bound to provoke its antithesis. Two can play the game of implications. By shifting the terms in the formula of federalism, the counterpart of Marshall's doctrine could be invoked to limit the affirmative exercise of Congressional power: though we are a nation we are also a federation of states, as declared by the Tenth Amendment, and Congressional authority may therefore by subjected to such limitations as the Court deems necessary

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42. *See, e.g.*, Ableman v. Booth, 62 U.S. 506 (1858). Chief Justice Taney's language calls on the surveyor metaphor: "And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." *Id.* at 516.

43. 329 U.S. 249 (1946).

44. *Id.* at 253.

45. *Id.* at 253-54.

46. 309 U.S. 176, 188-89 (1940) (Black, Frankfurter, and Douglas, JJ., dissenting).

47. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937).

for the protection of the independent existences of the states.[48]

Not only had Frankfurter laid down the rationale that would later power the judicial activism of *Bartkus* and *Feldman*, but he had precisely foreseen the holding of *National League of Cities v. Usery*[49] — thirty-nine years in advance.

ii. Justice Rehnquist's Conception

In *Usery*, the National League of Cities, the National Governors' Conference, and a number of individual cities and states challenged the constitutionality of the 1974 amendments to the Fair Labor Standards Act. After the district court had upheld the amendments on the basis of *Maryland v. Wirtz*[50], the plaintiffs appealed directly to the Supreme Court.[51] Writing for the Court, Justice Rehnquist held that the amendments, representing a direct regulation of the states as public employers, "transgress[ed] an affirmative limitation on the exercise of [Congress'] power akin to other commerce power affirmative limitations contained in the Constitution."[52] Justice Rehnquist analogized this federalism-based limitation to limits based on the jury guarantee of the sixth amendment and the due process clause of the fifth amendment.[53] Rejecting the dissenters' suggestion that the role of the judiciary in enforcing constitutionally-mandated individual rights differs from its role vis-a-vis protection of state prerogatives from Congress' exercise of the commerce power, the *Usery* Court struck down a commerce-based congressional enactment for the first time since *Carter v. Carter Coal Co.*[54]

Usery solidly entrenched the Supreme Court and the judiciary generally as monitor of the boundary between affirmative congressional power pursuant to the commerce clause and powers appertaining to state sovereignty. *Usery* thus reflects "a very far-reaching view of the role of the Supreme Court."[55] And yet the startling judicial activism of *Usery* merely brought the Court's monitoring of commerce boundaries even with its activism in monitoring the federal-state boundaries in criminal procedure, as instigated by *Bartkus* and *Feldman*. Two jurists well known as champions of judicial restraint, Justices Frankfurter and Rehnquist, had brought the Court to the height of activism in protecting their similar conceptions of federalism.[56]

The close kinship of the theories of substantive federalism underlying *Bart-*

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48. *Id.* at 18-19.

49. 426 U.S. 833 (1976).

50. 392 U.S. 183 (1968).

51. *See* 28 U.S.C. § 1252 (1979).

52. *Usery*, 426 U.S. at 841.

53. *Id.*

54. 298 U.S. 238 (1936).

55. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 97 (1985). Although this observation directly pertains to the dissenters' views in *Garcia*, it applies equally to the Court's views in *Usery*.

56. *Usery* was not Justice Rehnquist's only forum for the airing of his substantive federalist views. *See, e.g.*, United Credit Bureau of America, Inc. v. NLRB, 454 U.S. 994, 994-95 (1981) (Rehnquist, J., dissenting from denial of certiorari); Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 307-13 (Rehnquist, J., concurring); Fry v. United States, 421 U.S. 542, 552-53 (1975) (Rehnquist, J., dissenting). *See generally* Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

kus and *Feldman* on the one hand and *Usery* on the other is further signalled by a common analogy. Just as Justice Frankfurter had done in *Bartkus*, Justice Rehnquist's *Usery* opinion likened the need for judicial enforcement of federalism to the need for judicial enforcement of the separation of powers among coordinate branches of government.[57] The point of the analogy is that the President and Congress could not possibly be left to allocate functions between themselves; how is the allocation of economic and social activity between the federal government and states any different? The bottom line for *Bartkus* and *Usery* alike is that the allocation of substantive parcels according to an externally and objectively identifiable boundary is not only possible, but constitutionally mandated, and therefore the objective and external force assigned to police the boundary is the judiciary.

The kinship of Frankfurter's and Rehnquist's substantive federalist theories is partially obscured from view by minor differences in operation. Justice Frankfurter thought it important for the Court to divine the federal-state boundaries by reference to accretional rules formed by custom, practice, and pragmatic considerations. He eschewed any attempt to draw bright-line boundaries capable of application to a broad spectrum of situations. In *Union Brokerage Co. v. Jensen*,[58] Justice Frankfurter's opinion for the Court observed that the constitutionality of state legislation under the commerce clause is determined not by general rules but "by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances."[59] Later, dissenting in *H.P. Hood & Sons v. DuMond*,[60] Justice Frankfurter insisted on the need for a remand to the trial court for findings on the relative weight of rival state and national interests: "I cannot agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes."[61]

Again, Justice Frankfurter's view on this subject was probably most clearly stated outside of his role as a judge. In his historical analysis of the commerce clause, Frankfurter used striking language to stress the importance of resisting the temptation of drawing federal-state boundaries with too broad a brush: "In the history of the Supreme Court no single quality more differentiates judges than the acuteness of their realization that practical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power."[62] As can be gleaned from the foregoing Frankfurter opinions, Frankfurter the judge clearly lived up to the judgment of Frankfurter the commentator, at least in this one respect.

By contrast, Justice Rehnquist's *Usery* opinion does attempt to paint the boundary line with a broad brush indeed. The opinion is littered with such sweeping phrases as "functions essential to separate and independent existence"[63] and impermissible interference with "integral governmental func-

57. *Usery*, 426 U.S. at 841-42 n.12.

58. 322 U.S. 202 (1944).

59. *Id.* at 211.

60. 336 U.S. 525 (1949).

61. *Id.* at 564 (Frankfurter, J., dissenting).

62. F. FRANKFURTER, *supra* note 47, at 34.

63. *Usery*, 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559 (1911)).

tions."[64] Equally significant was the Court's willingness to speculate about the effects of the Fair Labor Standards Act amendments at issue. The Court first hypothesized what policy choices states may have made or may have wanted to make in structuring their pay scales.[65] Then, after duly noting that the procedural posture of the case made the likely effects of the amendments unclear, the Court went on to theorize about such potential effects.[66] Finally, as if realizing the sparseness of the record upon which it was basing its speculation, the Court stated, "[w]e do not believe particularized assessments of actual impact are crucial to resolution of the issue presented."[67] One can scarcely conceive of an approach more different than Justice Frankfurter's intensely fact-sensitive approach in *Hood*.

Still, this marked difference in willingness to draw broad boundaries cannot vitiate the validity of the observation that both justices saw it as the judiciary's duty and opportunity to itself draw and monitor the lines between national and state power, and that each of these justices had succeeded in persuading a majority of his brethren to seize this opportunity. As Professor Frankfurter had noted with such prescience, the Marshall Court's activist use of the dormant commerce clause doctrine truly would provoke not a response of future judicial restraint, but its "antithesis": judicial activism in protection of state sovereignty, not only in the economic field but in the realm of criminal procedure as well.

B. The Theory of Structural Federalism

i. Justice Brennan's *Usery* Dissent

In his *Usery* dissent, Justice Brennan took a view of federalism very different from the theory of substantive federalism in *Bartkus, Feldman* and the *Usery* majority opinion. Justice Brennan's dissent championed a theory of what shall be referred to as "structural federalism."[68] Borrowing heavily from Professor Wechsler's "The Political Safeguards of Federalism,"[69] Justice Brennan argued that the framers intended for states to protect their interests not through recourse to courts acting as umpires of the federal-state relationship, but rather through their own participation in the federal decisionmaking process. The theory holds that "federalism" inheres in — and fully consists of — a structure of federal representation and decisionmaking that guarantees as much protection for state interests as the states themselves think necessary or desirable. The theory of structural federalism views the *Usery* allocation of substantive parcels as unwarranted judicial intervention into what the framers intended to be a political process.

Judicial redistribution of powers granted the National Government

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64. *Id.* at 851.

65. *Id.* at 848.

66. *Id.* at 850-51.

67. *Id.* at 851.

68. The term is borrowed from Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 88 (L. Friedman & H. Scheiber eds. 1978). Justice Douglas referred to it as "congressional federalism." Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting).

69. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

> by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress.[70]

In other words, states are expected to protect their interests through their United States Representatives and Senators, who inherently hold loyalties to the states from which they are elected; through their powerful lobbies; and through their leverage on the presidential electoral apparatus.[71] Though it failed to impress the members of the *Usery* majority, the Brennan/Wechsler structural federalism theory claimed direct descent from a distinguished forebearer: James Madison's Federalist Papers.[72] The theory attracted Justices White and Marshall as immediate adherents.

ii. The *Garcia* Decision

As it turned out, what was more interesting than which justices immediately embraced structural federalism was which one *eventually* embraced it. Somewhere between 1976 and 1985, Justice Blackmun abandoned his uneasy acceptance of substantive federalism and gave the structuralists a majority in *Garcia v. San Antonio Metropolitan Transit Authority*.[73] The issue in *Garcia* was whether overtime and record-keeping requirements under the Fair Labor Standards Act could be applied to a state-owned, state-operated transit authority. A federal district court, following *Usery*, performed its surveying function and found that "[h]istory indicates that transit falls on the states' side of the line."[74] As in *Usery*, the district court judgment was appealed directly to the Supreme Court.[75]

Justice Blackmun's opinion for the Court reviewed the federal courts' experience with the allocation of parcels under the theory of substantive federalism, as developed by *Usery* and *Hodel v. Virginia Surface Mining & Recl. Assn.*[76] The opinion pointed to the scattered, seemingly irreconcilable allocations made by lower courts.[77] The lower courts had been unable to define a coherent set of criteria by which to sort the various parcels of economic and social activity. For illustrative purposes, Justice Blackmun noted that the lower courts had allocated the following parcels to the states (declaring them "integral governmental functions" of the states): the regulation of ambulance services, the licensing of

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70. *Usery*, 426 U.S. at 876-77 (Brennan, J., dissenting).

71. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-90 (1980).

72. *See Usery*, 426 U.S. at 876-77 (Brennan, J., dissenting), (citing THE FEDERALIST NO. 45, at 311-12 & NO. 46, at 317-18 (J. Madison) (J. Cooke ed. 1961)); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954) (quoting WRITINGS OF JAMES MADISON 383, 395-96 (Hunt ed. 1910)).

73. 469 U.S. 528 (1985).

74. San Antonio Metropolitan Transit Authority v. Donovan, 557 F. Supp. 445, 454 (W.D. Tex. 1983).

75. *See supra* note 51.

76. 452 U.S. 264 (1981).

77. *Garcia*, 469 U.S. at 538-39.

automobile drivers, the operation of a municipal airport, the disposal of solid wastes, and the operation of a highway authority. The following parcels had been allocated to the federal government (i.e., declared outside the sacred bounds of state sovereignty): the issuance of industrial development bonds, the regulation of intrastate natural gas sales, the regulation of traffic on public roads, the regulation of air transportation, the operation of mental health facilities, and the provision of in-house domestic services for the aged and disabled. "We find it difficult, if not impossible, to identify an organizing principle" throughout these decisions, Justice Blackmun wrote.[78] The lower courts were casting serious doubt on the validity of one of the chief assumptions of *Usery/Feldman/Bartkus* substantive federalism: that courts were capable of ascertaining an objective and coherent boundary between federal and state economic and social activity.

In his quest for a coherent principle of allocation, perhaps Justice Blackmun could have simply substituted a more workable definition for *Usery's* "integral governmental functions" test. He might have accepted the notion previously attributed to Justice Frankfurter: that the rules of allocation should be informed as much as possible by accretional rules formed by painstaking recourse to custom, practice, and pragmatic considerations.[79] Presumably, this would have opened the courthouse doors to a flood of empirical data, although Justice Frankfurter would have admonished us to endure this flood, "howsoever complicated and difficult the practical accommodations to it may be."[80] Professor Michelman has also suggested a definition of "integral governmental functions" that might provide more guidance than the bare terminology of *Usery*.[81] Either of these routes might have produced a modification or sharpening of substantive federalist theory, all the while retaining the basic notion that courts properly act as surveyors of the boundary between federal and state activity.[82]

But Justice Blackmun and the *Garcia* majority had a different idea. They all but buried the substantive approach, instead adopting the Brennan/Wechsler structuralist approach without apparent reservation.[83] "It is no novelty to

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78. *Id.* at 539.

79. *See supra* notes 58-62 accompanying text.

80. Feldman, 322 U.S. at 490-91.

81. When established constitutional practice assigns some well-defined governmental function to the states rather than to the central government . . . then that responsibility has been 'reserved' to the states and not 'delegated' to Congress. One such function is that of providing (authorizing provision by municipalities of) certain 'free' public services in satisfaction of conditions of social justice. If Congress unreasonably or uncaringly impedes a state government's ability to carry out such a responsibility, Congress is exercising nondelegated powers and violating the principle of reservation to the states.

Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1180 (1977). Professor Michelman's chief objective seems not so much to have been the creation of a more workable version of *Usery* as it was to show what a powerful force *Usery* actually could be for the guarantee of free social services. Nonetheless, his formulation might have proved more helpful than the *Usery* formulation.

82. *See supra* note 42 and accompanying text.

83. Professor Field notes that Justice Blackmun "did take care to leave open some possibility of a state sovereignty limitation on congressional powers," but that any such limitation would be a narrow one. *See* Field, *supra* note 55, at 89.

observe," Justice Blackmun wrote, "that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."[84] Because state legislatures had the power to set qualifications of electors for members of the House of Representatives and for President, and because state legislatures chose both United States Senators from their states, the framers expected states to protect themselves from congressional overreaching by exerting influence at the federal decisionmaking level.[85] As Justice Brennan's *Usery* dissent had done, Justice Blackmun relied heavily on Professor Wechsler's work and the writings of Madison.[86] The *Garcia* Court could also have found comfort in the words of the man who had, in Professor Frankfurter's estimation, "provoked" the activism of *Usery*, Chief Justice Marshall:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[87]

With *Garcia*, structural federalism had carried the day.

III. Double Jeopardy Implications of Structural Federalism

We have seen that the theory of substantive federalism that underlies *Lanza/Bartkus/Abbate* and *Usery* has been rejected by a majority of the Supreme Court in *Garcia*, and replaced by a theory of structural federalism. The next question is whether the ascendance of structural federalism logically dictates the rejection of the dual sovereignty exception to the double jeopardy prohibition, or whether, even assuming the correctness of structural federalism,[88] it is still fair to say that federalism compels the availability of successive prosecutions for the same offense.

A. Understanding the Problem

It may at first be difficult to conceptualize the operation of structural federalism in the double jeopardy sphere, for the same reason that it is somewhat difficult to understand the whole relationship of federalism in general to double jeopardy. Unlike general commerce clause controversies, where state and federal governments seem to be squaring off in direct one-on-one confrontations, the double jeopardy cases contain a third analytic element: the double jeopardy prohibition. One might look at *Usery* and observe that the Court actually struck down a congressional enactment that was adjudged to be in derogation of the federal system, and then wonder if substantive federalism was ever really invoked at all in the double jeopardy cases, since no federal prosecution has ever been struck down as being in derogation of federalism. The confusion is understandable. *Lanza* and *Bartkus* created the confusion by interposing an artificial definition of double jeopardy between the states and the federal government. By

84. *Garcia*, 469 U.S. at 550-51 (citation omitted).

85. *Id.*

86. *Id.* at 550-51 n.11.

87. Gibbons v. Ogden, 22 U.S. 1, 97 (9 Wheat. 1) (1824).

88. A partial defense of the merits of structural federalist theory appears at Section IV, *infra*.

in effect redefining double jeopardy to mean "twice in jeopardy by the same sovereignty," the Court obviated any need to strike down individual prosecutions. If the Court had settled for the natural and probable meaning of the double jeopardy clause — that government in general may not prosecute a person twice for the same offense[89] — then the protection of substantive parcels within the law enforcement sphere would have required striking down individual federal prosecutions. From the structuralist's perspective, the error of *Lanza, Bartkus*, and *Abbate* was not that the Court intervened in the political process by invalidating individual prosecutions, but that it altered the course of constitutional interpretation to accommodate its own conception of the proper allocation of substantive parcels. Put another way, the structuralist blames the *Lanza, Bartkus*, and *Abbate* Courts for willingly tampering with the natural definition of double jeopardy in order to preserve an ostensibly objective and constitutionally mandated allocative order that in reality is constitutionally mandated only insofar as the interplay of federal and state *political* forces dictates it.

B. A Fact Pattern

Let us momentarily pull this idea down to a lower level of abstraction. Consider the following fact pattern taken from *United States v. Grimes*.[90] On February 24, 1974, appellant Shahid Ali was arrested in connection with the armed robbery of a savings and loan in West Orange, New Jersey. Both FBI and Newark police officials interrogated Ali. On March 12, 1974, a federal grand jury indicted Ali on two counts: robbery of a federal savings and loan; and putting a life in jeopardy through the use of a dangerous weapon during the commission of the robbery.[91] Some time in mid-April, 1974, a state grand jury indicted Ali for armed robbery of the savings and loan, *inter alia*. A federal jury convicted Ali on both counts of the federal indictment. After the imposition of sentence on the federal charges, Ali pled guilty to the state armed robbery charge. After his attempts to have his state and federal sentences served concurrently or credited against each other failed, Ali moved to vacate his federal sentence.

How would the substantive federalist analyze Ali's case? In her view, the judiciary has performed its proper function in allowing the successive state prosecution. The judiciary made an independent, external, and correct judgment about the allocative order between the federal and state governments in the law enforcement sphere and decided that bank robbery is one of those parcels upon which both governments must be allowed to stand, if they wish. The only way to ensure that each sovereignty will not be pushed off the plot (i.e., precluded from its one opportunity to prosecute) is to create an exception to the double jeopardy prohibition.

The structural federalist would view Ali's case differently. Federalism concerns were assuaged long before the case reached the courts — indeed, long before the bank robbery was committed. New Jersey had a full complement of senators and representatives in Congress when the federal bank robbery statute

89. Consider the comparative and historical analysis in Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932).

90. 641 F.2d 96 (3d Cir. 1981).

91. 18 U.S.C. § 2113(a), (d) (1985).

was enacted. The institution of Congress, New Jersey delegation included, made a judgment that the protection of federal interests required the dedication of federal law enforcement resources to the battle against bank robbery. If the passage of federal legislation in the area might involve some displacement of traditional state coverage, then courts must presume that a calculation was made to the effect that the battle against bank robberies would be better off for the availability of federal prosecution. In other words, each state's congressional delegation actively participated in an institutional process whereby a gamble was decided upon: the states would cede the absoluteness of their right to prosecute bank robbery in the hope that the availability of federal resources would result in better overall deterrence and prosecution of bank robbers. With every peace officers' association and every state's attorneys' organization in the nation having made its opinion about the wisdom of this gamble known, the representatives and senators of the several states "paid their money and took their chances," as it were. To the structuralist, it is flatly wrong to say that federalism requires the courts to relieve New Jersey of the consequences of its participation in the gambit.

C. Conclusion

The ascendance of structural federalist theory compels the conclusion that federalism (correctly viewed) does not require a dual sovereignty exception to the double jeopardy prohibition. Of course, structural federalism is not necessarily inconsistent with such an exception to double jeopardy; the exception could well be justified by reasons other than federalism. But if the theory of structural federalism is correct, then federalism itself cannot justify the exception.[92]

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92. One logistical problem cries out for attention. As stated in the text, the structural federalist assumes the congressional enactment of a criminal statute represents a conscious gamble that the availability of federal prosecution and enforcement resources is worth the potential displacement of states' prerogatives to prosecute. This assumption is correct only if Congress is given time, prior to the effective date of a judicial ruling recognizing structural federalism in the double jeopardy context, to review its criminal statutes. Thus, if the Supreme Court were to overrule the dual sovereignty exception because of the recognition of structural federalism, it would have to stay the prospective application of its holding for a limited review period. *See, e.g.*, Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 88-89 (1982) (judgment stayed to give "Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); Buckley v. Valeo, 424 U.S. 1, 142-43 (1976) (stay granted to give Congress time to reconstitute the commission or to adopt "other valid enforcement" of statute).

During this review period, Congress would have to make sure that it repealed statutes in areas in which it wanted to preserve an *absolute* state right to prosecute. Such a review process could prove beneficial. Members of Congress would be forced to think clearly about the interplay of federal and state interests and about the efficiency of law enforcement mechanisms in specific areas. It is imperative to realize, however, that the Court could not suddenly embrace structural federalism in the double jeopardy context, bar successive prosecutions in all cases, and then "assume" that the states (in Congress assembled) had made a knowing and deliberate choice to cede individual states' absolute rights to prosecute. Under such circumstances, members of Congress would have had no idea that there was any trade-off or sacrifice of states' rights to prosecute involved in the enactment of federal criminal statutes, since successive prosecutions had always previously been available.

IV. DEFENDING THE MERITS OF STRUCTURAL FEDERALISM

That structural federalism has prevailed over substantive federalism in the latest United States Reports does not, in itself, disprove the validity of substantive federalism. It was a relatively short jog from *Maryland v. Wirtz* to *NLC*, and roughly the same amount of time passed between *Usery* and *Garcia*.[93] The triumph of structural federalism could well be short-lived.[94] Still, the mere fact that structural federalism currently enjoys the support of a majority of the Court leads one to believe that courts must begin to think about what alternatives they will have if the reports of the death of substantive federalism prove not to be greatly exaggerated.

This call to consider alternatives will become progressively more urgent as courts or commentators become persuaded that *Garcia* and the theory of structural federalism generally and sound. A full argument extolling the intellectual virtues of structural federalist theory is beyond the scope of this Article. However, it is worth examining one of the more interesting criticisms of structural federalist theory for the purpose of determining how much of a threat to *Garcia*'s viability it really poses. The criticism, mentioned earlier, is the idea that structural federalism must be wrong because such deference to the political process would clearly be incorrect in the separation of powers context. By no means is this the only serious criticism of structural federalism, but many of the others have been dealt with elsewhere.[95] Frankly, the "separation of powers" objection appears to be among the largest obstacles to a realization by courts (and scholars) that the time has come to face the post-substantive federalist world, not only in the realm of double jeopardy, but in all contexts.

A. The Separation of Powers Objection

It is common wisdom that the framers built into the constitutional system two great bulwarks against the centralization of governmental power: the separation of powers and federalism.[96] In the first case, the framers hoped that the division of federal responsibilities and prerogatives among three coordinate branches would prevent the formation of an insulated oligarchy. In the second case, the framers hoped to further prevent centralization of power by denying those three branches all but affirmatively delegated powers, reserving all other powers to the states or to the people.[97]

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93. *Maryland v. Wirtz* was decided in 1968. *Usery* was decided in 1976, and *Garcia* in 1985.

94. Note the prediction in Justice Rehnquist's brief dissent in *Garcia*: "[Substantive federalism] will, I am confident, in time again command the support of a majority of this Court." 469 U.S. at 580 (Rehnquist, J., dissenting).

95. *See, e.g.*, Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) (answering the contention that changes in political circumstances since the drafting of the Constitution render states defenseless under structural federalism); Field, *supra* note 55 at 108-09 (answering contention that states' interests should be protected by the judiciary against "the excesses of majority rule" in the same way that individual rights of minority groups are protected through judicial intervention).

96. *See supra* note 38 and accompanying text. In addition to preventing undue centralization of power, these devices may have been meant to help maintain a stable relationship between liberal and civic republican values in American society. *See* Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985).

97. The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall

i. Difference: Inherent Loyalty of the Populace

The importance and purpose of the separation of powers and federalism as barriers against centralization are not to be doubted. But the mere fact that separation of powers and federalism serve similar purposes does not necessarily mean they were meant to bear — or should bear — the same relationship to judicial review.[98] An important difference between the separation of powers and federalism can be found in the framers' conception of how equilibrium would probably be maintained between the respective institutions. Professor Scheiber has written that the framers envisioned natural loyalty among the people to be one of the greatest checks against an overreaching federal government.[99] In the event that the national and state governments should become involved in a rivalry, Madison thought, "[a]ll the weight of traditional popular loyalties lay on the side of the states."[100] Similarly, Hamilton thought that "common men" were too short-sighted and provincial to place their greatest trust or loyalty in an all-encompassing national government.[101] Thus, Hamilton predicted that local pressures would "constantly *impose* on the national rulers the *necessity* of a spirit of accommodation."[102]

Madison and Hamilton clearly foresaw this inherent loyalty to the states as one of the prime forces in the protection of state interests vis-a-vis the new national government. Together with a constitutional system that gave states a very large degree of control over the composition of the national government, this loyalty largely obviated the need for any further institutional checks against federal power, such as judicial intervention on states' behalf. By contrast, the people were unlikely to feel any particular loyalty to the legislative branch over the executive branch, or vice-versa. And, although modern-day presidents do exert influence over the composition of Congress, and although members of Congress exert some influence over the election of presidents, the framers probably could not have foreseen the great ascendance in importance of party electoral apparatus and the media-induced personal popularity of presidents.[103] But the framers' presumable failure to predict the political realities of 20th century

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not be construed to deny or disparage others retained by the people." The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amends. IX, X.

98. As an illustration, consider the constitutional guarantee that no "civil officer of the United States," U.S. CONST. art. II, § 4, may be removed except upon conviction by the Senate. U.S. CONST. art. I, § 3. Certainly the right to a trial by the Senate constitutes one of the important obstacles to undue centralization of power; without it, Congress could easily deprive agency heads and cabinet officers the freedom to implement statutes as the President sees fit simply by threatening to remove them. Yet it is generally assumed that conviction after impeachment is not normally subject to judicial review. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 456 (10th ed. 1980) (citing COMMITTEE ON FEDERAL LEGISLATION OF THE BAR ASS'N OF THE CITY OF NEW YORK, THE LAW OF PRESIDENTIAL IMPEACHMENT).

99. Scheiber, *supra* note 68, at 90-91.

100. *Id.* at 90.

101. *Id.* at 91.

102. *Id.*

103. Modern-day presidents exert considerable influence over the composition of Congress by making campaign appearances on behalf of congressional or senatorial candidates. Representatives and senators play an important role in the election of presidents by mobilizing their campaign organizations and fund-raising apparatus on behalf of their party's presidential candidate.

America does not diminish the historical significance of their original understanding about the forces that would keep federal-state relations in equilibrium.[104]At a minimum, the fact that such founders of the Constitution as Madison and Hamilton saw little need for judicial intervention on states' behalf places a heavy burden on substantive federalists to justify the latter-day interposition of the courts between Congress and the states.

ii. Analogy to the Political Question Doctrine

A more fundamental problem with the "separation of powers" objection to structural federalism lies within the assumption that underlies the objection. As Justices Frankfurter and Rehnquist have voiced the objection, the assumption is that the legislative and executive branches could never be left to settle their own boundaries — that it would be an unthinkable abdication of the Court's constitutional duty to "say what the law is."[105] One may wonder, however, how to square this assumption with the existence of the "commitment to other branches" strand of the political question doctrine, which does nothing less than command the courts to leave certain matters to the other branches of government.[106] Indeed, it is noteworthy that the political question doctrine is compelled by the "relationship between the judiciary and the coordinate branches of the Federal Government."[107] The blanket reliance on the separation of powers doctrine as a reason for rejecting judicial abstention must be viewed in light of the fact that the same doctrine *requires* abstention from other questions.

There is an intriguing overlap of reasons for the political question doctrine and reasons supporting the structuralist view of federalism. The Court in *Baker v. Carr* listed a number of characteristics that might be found in a case presenting a political question.[108] Three of them bear a striking resemblance to reasons supporting structural federalism. First, a question may be nonjusticiable if there has been a "textually demonstrable constitutional commitment" of it to another branch.[109] Second, a question may be nonjusticiable under the political question doctrine if there is a lack of "judicially discoverable and manageable standards for resolving it."[110] Third, a question may be nonjusticiable if it is impossible to decide it "without an initial policy determination of a kind clearly for nonjudicial discretion."[111] The presence of any of these characteristics can be sufficient to render an issue nonjusticiable.[112]

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104. For a provocative analysis of the historical validity of "original intent" arguments, see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

106. G. GUNTHER, *supra* note 98, at 448.

107. Baker v. Carr, 369 U.S. 186, 210 (1962). The Court continued: "The nonjusticiability of a political question is primarily a function of the separation of powers." *Id.*

108. *Id.* at 217.

109. *Id.*

110. *Id.*

111. *Id.* Additionally, the *Baker* Court listed three other indicia of nonjusticiability: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarassment from multifarious pronouncement by various departments on one question." *Id.*

112. *See id.* "[U]nless *one* of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability. . . ." *Id.* (emphasis added).

Arguably, all three of these "formulations" are "inextricable" from the task of allocating substantive parcels of social and economic activity between federal and state governments. First, the "textually demonstrable constitutional commitment" has been treated as a requirement that there be adequate *historical evidence* of the issue's commitment to a coordinate branch of the federal government.[113] Of course, Professor Wechsler and the *Garcia* Court have already dug out and exposed the deep Madisonian roots of structural federalism.[114] Moreover, Professor Scheiber has concluded that, "in the last analysis," the framers believed that jurisdictional conflicts between Congress and the states would have to be resolved through the "informal political process."[115] Second, the *Garcia* Court graphically and thoroughly demonstrated the absence of "judicially discoverable and manageable standards" for substantive parcel allocation.[116] Although diehard substantive federalists might hold out hope that a Frankfurterian or Michelmanian retooling of the *Usery* "integral governmental functions" test would sharpen the analytical focus enough to yield judicially manageable standards for parcel allocation, the *Garcia* majority obviously held no such hope.[117] Third, as one constitutional scholar has already noted, substantive parcel allocation — if it is to be done in a principled manner — requires a "determinate theory of what a state must be and of how a state must function in the federal system."[118] In other words, if the Supreme Court is to assume the responsibility of parcel allocation, it must attempt the awesome task of determining the *raison d'etre* of the political entities known as "states," and their relationship to the federal government. Failure to develop such a coherent theory of statehood would result in either arbitrary allocation or a system of allocation unsuitable for judicial use.[119] At the same time, however, the development of any such theory of statehood would be so controversial and continually threatened with obsolescence that it approaches the status of an "initial policy determination of a kind clearly for nonjudicial discretion."[120]

The purpose of comparing the political question criteria with the reasons behind structural federalism is not necessarily to suggest that the allocation of

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113. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 522-40 (1969).

114. *See supra* note 72 and accompanying text.

115. Scheiber, *supra* note 68, at 89.

116. *See supra* notes 77-78 and accompanying text.

117. Consider what one commentator has said about the difficulty of operating under the *Usery* standard: "[I]s it possible to posit any essential attributes of integral functions of state sovereignty, in the sense of operations without which there could be no state? Arguably, the "state" is not a thing, or even a value, but a dynamic set of more or less exchangeable relations or functions." Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271, 285-86 (1986). *But see* Field, *supra* note 55, at 104 (despite *Garcia* Court's claims to contrary, test setting aside area of core governmental functions not "inherently limitless or unworkable").

118. Skover, *supra* note 117, at 285.

119. Even if the courts failed to develop a coherent theory of statehood, they could allocate parcels based on functional analysis — i.e., based on courts' judgment of which political entity is capable of regulating more effectively and efficiently. However, use of such a functional analysis would subject courts to the risk that they have strayed beyond the limits of their competence. *See* Field, *supra* note 55, at 109 n.126. "[D]ecisions concerning whether in particular circumstances federal regulation should displace state decisionmaking may call for pragmatic judgments and knowledge of actual conditions, areas in which Congress is more adept than the judiciary." *Id.*

120. *See* text accompanying note 111.

substantive parcels is a nonjusticiable political question, although a colorable argument could be made for the proposition. Rather, the comparison is meant to show the fallacy of the assumption that underlies the "separation of powers" objections to structural federalism. In answer to Justice Rehnquist's *Usery* footnote, no, it is not absurd to think that the Constitution has left the executive and legislative branches to settle certain of their own boundaries.[121] The political question doctrine sometimes requires such deference. By the same token, it is not absurd to think that the Constitution, under the commerce clause, has left Congress and the states to settle their own boundaries under many of the same circumstances that trigger application of the "commitment to other branches" strand of the political question doctrine.

V. JUDICIAL OPTIONS IN LIGHT OF *GARCIA*

In light of the serious challenge to substantive federalism that *Garcia* poses, perhaps it is time for courts to begin thinking earnestly about the future of the dual sovereignty exception to the double jeopardy prohibition. By no means is the best course clearly charted. The first task is to view the options that courts will have if structural federalism turns out to possess greater staying power than its predecessor. It requires little imagination to suggest that the options fall into two categories: those that assume retention of the dual sovereignty exception, and those that assume overruling.

A. Practical Consequences of Overruling the Exception

The options that assume overruling the exception generally consist of ways to ameliorate or assuage practical concerns. What are the practical concerns? The most oft-mentioned fear is that the unavailability of successive prosecutions will lead to "races to the courthouse."[122] Not wanting to be precluded from a later prosecution, federal and state prosecutors may race each other to initiate proceedings against some defendants. In their haste to "stake their claim," as it were, prosecutors might bring premature or ill-supported charges. Such premature and/or inadequately supported charges would then be vulnerable to indictment dismissal (if the case was improvidently brought) or Speedy Trial Act[123] dismissal (if the case was simply brought too early for the United States Attorney to develop sufficient evidence within the allowable time). Worse yet, from the standpoint of protecting civil liberties, defendants would have to endure this

121. *See generally* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (challenge to presidentially-ordered bombing of Cambodia after lapse of congressional authorization found nonjusticiable); Sarnoff v. Connally, 457 F.2d 809 (9th Cir. 1972), *cert. denied*, 409 U.S. 929 (1972) (delegation of war power from Congress to President nonjusticiable); Head v. Nixon, 342 F. Supp. 521 (E.D. La. 1972) *aff'd*, 468 F.2d 951 (1972) (action alleging that conduct of Vietnam War violated express grant of war declaration powers to Congress held nonjusticiable).

122. *See, e.g.*, Brant, *Overruling Bartkus and Abbate: A New Standard for Double Jeopardy*, 11 WASHBURN L.J. 188, 203 (1972); Note, *Towards An Integrated Theory of Interjurisdictional Double Jeopardy: An Alternative to Section 707 of the Proposed Federal Criminal Code*, 58 CORNELL L. REV. 734, 748 n.85 (1973), (citing *Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92nd Cong., 2d Sess. pt. 3, 927, 931 (statement of A. Miller, Attorney General of Virginia) (1972) (frequent objection to § 708 of the proposed federal criminal code was that it would create "races to the courthouse")).

123. 18 U.S.C. § 3161, *et. seq.*

rash of improvident charges, spending large amounts of time and money defending themselves while needlessly incurring the stigma that an indictment or information can bring.

It is unclear how realistic this scenario is.[124] Federal and state prosecutors seem to get along pretty well when it comes to cracking down on certain major areas of concern — drug trafficking and distribution, for example.[125] One particular type of race to the courthouse, however, is especially troubling. As mentioned at the outset, it is not beyond the realm of possibility that, in less racially tolerant areas, local prosecutors may arrange sham trials of those accused of racially motivated crimes, aiming for convictions on greatly reduced charges or even for outright acquittals. If *Abbate* were overruled, either conviction or acquittal might serve to preclude subsequent federal prosecution under the civil rights laws.[126] The unavailability of a subsequent federal prosecution, in turn, might well lead to greater violence. If only because of this "civil rights scenario," the race to the courthouse concern is serious.

Less serious, but troubling nonetheless, is the certainty of imperfect coordination between federal and state prosecutors. Even if they agree completely about which of them should prosecute general categories of crimes, there are bound to be occasions upon which one undertakes a prosecution not realizing that the other jurisdiction has a much greater interest in prosecuting. Perhaps the other jurisdiction has a greater need to vindicate its authority over the particular conduct engaged in; or perhaps the other jurisdiction needs the threat of prosecution to obtain valuable information leading to the arrest of others. Either way, the "accidental" commencement of proceedings and following attachment of jeopardy by the first jurisdiction would preclude prosecution by the more interested jurisdiction. Put simply, the overruling of the dual sovereignty exception would put a hefty price tag on mistakes in federal-state prosecutorial coordination.

A third concern with the overruling of the exception is the protection of federal supremacy.[127] This concern supposes that precluding a federal prosecution after a state conviction or acquittal would run afoul of the spirit, if not the letter, of the supremacy clause.[128] Whether the preclusion of successive state-

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124. *See* Brant, *supra* note 122, at 203. *See also* State v. Fletcher, 15 Ohio Misc. 336, 240 N.E.2d 911 (1968): "The cases are replete with examples of the entirely commendable practice of hand-in-glove co-operative efforts by state and federal authorities to investigate crime, gather evidence, and prosecute criminals." *Id.*

125. *See, e.g.*, United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (joint federal-state drug enforcement task force); 11 DRUG ENFORCEMENT 10 (1984):

> To facilitate the collaboration with state and local law enforcement elements, the Task Force Program encourages, where appropriate, the cross-designation of Federal attorneys and state and local attorneys; the deputation of state and local police officials as Special Deputy U.S. Marshalls; the payment of certain overtime, travel, and per diem costs for state and local officials engaged in Task Force work; and the signing of agreements to set forth the nature of the understanding between the Task Forces and the state and local jurisdictions.

Id.

126. *See supra* note 9.

127. *See* Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607, 608-09 (1966).

128. Article VI of the Constitution states in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the

federal prosecutions would be inconsistent with the Supremacy Clause is beyond the scope of this Article.[129] Assuming, however, that supremacy clause problems would follow a flat overruling of *Abbate*, it would be wise to consider the ways in which the overruling of *Abbate* could be adjusted to reconcile it with the supremacy clause doctrine.

B. Minimizing Practical Concerns: The "Separate Interests" Test

The importance of the foregoing concerns cannot, of course, be assessed in a vacuum. If the dual sovereignty objection is overruled, there will be ways to ameliorate some or all of the above-mentioned concerns. But these methods of amelioration will carry their own costs, which must be weighed against the gravity of the concerns they were meant to address. By the same token, if the exception is not overruled, the failure to overrule it even in light of *Garcia* will entail a need for excruciating candor or will threaten a loss of judicial credibility.

One way to minimize the practical concerns would be to narrow the universe of instances in which the double jeopardy prohibition applies. Such a "narrowing" would not, in a strict sense, solve the above-enumerated practical problems; rather, it would simply make them more tolerable by reducing their statistical occurrence. Specifically, the narrowing option involves replacement of the *Blockburger* definition of "same offense."[130] Instead of defining "same offense" to mean crimes that each contain an element not contained by the other, it would be defined as crimes that are intended to prevent a substantially different harm or evil.[131] Alternatively, "same offense" could be defined as crimes with the same "gist, purpose or gravamen," or as legislative enactments aimed at vindicating the same societal interests.[132]

The replacement of the "same evidence" test with this "same interest" test would presumably eliminate the troubling "civil rights scenario" referred to above. The general interest vindicated by a state murder statute is the protection of lives, whereas the specific interest vindicated by the federal civil rights statute is the protection of constitutional rights. Thus, a federal civil rights prosecution would always be available following a sham prosecution or plea bargain arrangement by a sympathetic state's attorney. At the same time, the "separate interest" test ostensibly would protect the garden-variety bank robber from successive state-federal or federal-state prosecutions. After all, both federal and state bank robbery statutes are aimed at preventing bank robberies; the existence

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Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art VI.

129. Without delving too deeply into the question, it would seem that such a bar would not be inconsistent with the surpremacy clause. Congress always has the capacity to preempt the field; it would seem to be unwarranted judicial intervention for a court to afford the federal government a "second bite at the apple" after Congress had made a decision not to guarantee the availability of federal prosecution in a particular area.

130. *See generally* Fisher, *supra* note 127, at 616-19 ("separate gist" test an "undesirable solution"); Note, *supra* note 3, at 1559-64 ("separate interest" test has "much to recommend it"). *Cf. Bartkus*, 359 U.S. at 138. In applying state statutes that bar subsequent state prosecutions, state courts must frequently ascertain the "gravamen" of the criminal statute in question to determine if it is the same offense. *Id.*

131. MODEL PENAL CODE § 1.10(I)(a) (1962).

132. Fisher, *supra* note 127, at 617.

of the federal statute owes only to Congress' desire to make federal law enforcement apparatus available to help combat bank robberies.[133] Because the federal and state bank robbery statutes thus have the same "gist," and are aimed at the vindication of identical societal interests, they would constitute the same offense. In a sense, then, the adoption of the "separate interest" test would arguably create a best-of-both-worlds situation: The double jeopardy prohibition is given its full due in the context of ordinary crimes, yet the supreme federal interest in protecting federal constitutional rights is uncompromised. Moreover, the reduced statistical application of the double jeopardy prohibition lessens the seriousness of the "race to the courthouse" concern.

The "separate interests" solution, however, is not without its costs. In his separate opinion in *Abbate*, Justice Brennan stressed the dangers of the "separate interest" test.[134] He thought the redefinition of "same offense" to exclude statutes aimed at different evils would open the door to legislative and prosecutorial claim-splitting in the unijurisdictional context. Justice Brennan's concern can be illustrated by a latter-day hypothetical. Suppose a state already has a sodomy statute on the books. As an expression of its moral disapproval of homosexual behavior and lifestyles, the legislature also enacts a statute proscribing sodomy between persons of the same sex. Fearing spread of acquired immune deficiency syndrome (AIDS), the legislature further enacts a statute prohibiting homosexual sodomy without prior medical examination for the AIDS virus. Then, in an attempt to minimize the risk of jury nullification,[135] prosecutors undertake *seriatim* prosecutions under all three statutes.

Under the *Blockburger* definition of same offense, only the first prosecution (in any order) could stand.[136] Paired any way, only one of the crimes would contain an element not contained by the other. The second crime, of course, requires proof that the participants were both of the same sex, whereas the first crime contains no such element. But the first crime contains no element not contained by the second crime. It is the classic lesser-included offense. Substantially the same analysis applies to the first and third crimes paired together. The third crime requires proof of same-sex participants and failure to obtain a prior medical examination, whereas the first crime lacks both of these elements. Again, however, the first crime contains no element lacking in the third crime, making it a lesser-included offense. Finally, the second crime is lesser-included within the third, since it contains no elements not contained in the third.

Under a "separate interest" standard, the result might well be different. The hypothetical's basic sodomy statute, drawing no distinction between heterosexual and homosexual conduct, seems aimed simply at eliminating sodomy as a form of "sexual perversion" in society at large. The putative interest underlying

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133. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 96 n.3 (1964) (White J., concurring). *See also Bartkus*, 359 U.S. at 133 n.22.

134. *Abbate*, 359 U.S. at 196 (Brennan, J., writing separately).

135. For an interesting treatment of how the concept of jury nullification intersects with the law of successive multijurisdictional prosecutions, see Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982). The Note's author concludes that federal prosecution following a state jury acquittal should be prohibited because it eliminates the jury's prerogative to nullify the law — i.e., soften its impact on a particular defendant.

136. *But see* Missouri v. Hunter, 459 U.S. 359 (1983) (government may pursue all three charges in a single prosecution which could result in the assessment of punishment under all three statutes).

this first crime is the creation of a society in which no one engages in oral or anal sex because such conduct is "disgusting" or "immoral" or "perverse" or some combination thereof.[137] By contrast, the putative interest underlying the second crime might be the protection of the traditional American family unit from the perceived threat of homosexual "lifestyles." The difference between protecting morality for morality's sake and staving off the disintegration of the traditional family unit could be said to justify treating these statutes as different offenses under a "separate interest" standard. Certainly a colorable argument could be made that the third statute aims at an interest different than the first two because it focuses on the protection of public health. As a result, the state would be permitted successive prosecutions under these three statutes. Justice Brennan presumably would find this an unacceptable construction of the double jeopardy prohibition.[138]

It has been said that Justice Brennan's concern about unijurisdictional claim-splitting under the "separate interests" test is unwarranted because courts could simply use the *Blockburger* "same evidence" test in the context of unijurisdictional successive prosecutions, while using the separate interests test to define "same offense" in the multijurisdictional context.[139] Some may find it hard to be so sanguine about this double standard. After all, the double standard would suffer from the same conceptual infirmity as would the continuation of the dual sovereignty exception even in the wake of *Garcia*: it would indulge in an intellectual dishonesty, detrimental to an individual constitutional right, for the sake of institutional interests. In the instance of the continuation of the dual sovereignty exception, the dishonest proposition would be that the double jeopardy prohibition does not apply to successive state-federal or federal-state prosecutions because of federalism. Actually, as this Article has attempted to show, federalism (properly construed) requires no such restrictive reading of the double jeopardy prohibition. Continuation of the exception in spite of this discovery would be to use federalism as an excuse to perpetuate a rule that avoids some or all of the practical problems mentioned above. In the instance of the "double standard" (use of a "same evidence" test for unijurisdictional prosecutions but use of a "separate interests" test for multijurisdictional prosecutions), the dishonest proposition is that somehow the correct definition of "sameness" of offenses changes with the identity of the prosecuting sovereign. The courts may tie "sameness" to identity of elements, conduct, or interests, but whatever the formulation, it must be consistent. There is no principled justification for varying the formulation as the prosecuting sovereigns change. The true purpose of the double standard, of course, is to avoid practical problems. The proposal to adopt different "same offense" definitions for unijurisidictional and multijurisdictional prosecutions, then, succeeds only in shifting the locus of dishonesty from abuse of the concept of "federalism" to abuse of the definition of "same offense."

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137. *But cf.* Dalton, *"Disgust" and Punishment* (Book Review), 96 YALE L.J. 881 (1987) (reviewing J. FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1985) (disgusting conduct should be exempt from criminal sanction)).

138. *See Abbate*, 359 U.S. at 196-201 (Brennan, J. writing separately).

139. *See* Note, *supra* note 3, at 1560.

VI. Conclusion and Closing Reflections

This Article began with the observation that, if the dual sovereignty exception to the double jeopardy prohibition were truly motivated by the Supreme Court's belief in the theory of substantive federalism, and nothing else, the revelation of structural federalism's implications in the double jeopardy sphere would naturally bring the exception's demise. It is hoped that this is actually the case. However, this Article noted that hard choices would ensue if practical and institutional problems were found also to be a motivating factor behind the exception. The options, were: (1) abolish the exception and forge different solutions to the practical problems that would be created; (2) retain the doctrine and admit that practical and institutional concerns sometimes justify the curtailment or elimination of constitutionally mandated individual rights; (3) retain the doctrine and admit nothing; and (4) abolish the doctrine and the practical consequences be damned.

In the previous section, this Article attempted to illustrate why the first option carries little promise. The leading proposed solution to the practical problems that would ensue from an overruling of the dual sovereignty exception is the "separate interests" test. Yet the adoption of that test either opens the door to blatant unijurisdictional claim-splitting, or forces the concurrent adoption of an intellectually unsatisfying two-track definition of "same offense." The adoption of other solutions to the practical problems would not only require legislative intervention, but would greatly complicate and alter the face of American criminal procedure.[140]

The second option is to retain the exception and simply admit that practical and institutional concerns occasionally require the narrowing of individual rights, even constitutional ones. As a private observation, the proposition is hardly startling. For example, the Court has long upheld certain time, place, and manner restrictions on speech otherwise protected by the first amendment.[141] As a flat judicial pronouncement, however, the proposition may not be without repercussions. Professor Black has defended the use of absolutist language to describe constitutional prohibitions even where the prohibitions are not truly absolute.[142] In Professor Black's view, the absolutist language will encourage future courts to work harder and go to greater lengths to uphold constitutional ideals instead of resorting to balancing at an early stage of analysis.

Applied to the present problem, Professor Black's theory about absolutist language concedes that, as an empirical proposition, the courts sometimes do narrow constitutionally mandated rights on account of practical and institutional problems. Thus, to say that practical problems *never* justify the curtailment of constitutional rights is, strictly speaking, untrue. But Professor Black's theory holds that it may still be worth employing the absolutist language because an abandonment of the absolute may cause future courts not to treat

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140. *See, e.g.*, Fisher, *supra* note 127, at 610-13 (proposal to allow defendants choice between federal or state trial); Note, *supra* note 3, at 1554 n.108 (state and federal offenses might be tried in a combined proceeding).

141. *See, e.g.*, Feiner v. New York, 340 U.S. 315 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949).

142. C. Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's Mag., 63 (Feb. 1961). It is worth reading Dean Calabresi's discussion of Professor Black's argument. G. Calabresi, A Common Law for the Age of Statutes 172-77 (1982).

constitutional prohibitions specially. Future courts might look back at the admission that practical problems sometimes justify curtailment of constitutional rights and simply treat constitutional prohibitions as sundry interests, to be balanced against other social, practical, and institutional interests. Future courts might not accord constitutional rights a truly preferred place in the analytic hierarchy.

Consideration of Professor Black's theory suggests the third option: retain the dual sovereignty exception and admit nothing. Despite the presence of nothing more than practical reasons to retain the dual sovereignties doctrine, the Court could uphold the doctrine without explanation because we would rather live in a society that professes total adherence to constitutional prohibitions and occasionally (and silently) slips up, than live in a society that does not bat an eyelash at the idea that constitutional rights and matters of practicality must be balanced on equal terms.

This sort of strategic dishonesty is fraught with peril, to be sure. Dean Calabresi has decided that in a situation where there exists any doubt whether the dishonesty will actually secure better results in the future, then those who would opt for dishonesty have failed to carry their burden, and the "choice must be for candor."[143] However, Dean Calabresi does not explain how he arrives at the conclusion that the burden must fall on those who would favor dishonesty rather than on those who would favor the poorer result. The correct assignment of burden would seem to depend on whether, for purposes of legal reasoning, we are mainly utilitarians or mainly deontologists.[144] Mercifully, that inquiry is far beyond the scope of this Article.[145]

A deep and searching foray into ethical philosophy would be obviated by the choice of the fourth option — abolishing the dual sovereignty exception to the double jeopardy prohibition — and accepting the practical consequences. This is, of course, the least likely of the options actually to be chosen. Courts are understandably reluctant to upset the status quo simply because they perceive conceptual problems, particularly if the proposed change might create new and tangible problems. At the same time, however, it is an opportunity for the Court truly to affirm the preferred place of constitutional liberties in the nation's hierarchy of legal values. The abolishment of the dual sovereignty exception, without any corresponding judicial attempt to ameliorate the practical consequences, would doubtless make a momentous and courageous statement about the inalienability of constitutionally mandated individual liberties.

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143. G. CALABRESI, *supra* note 141 at 177.

144. *See, e.g.*, Lichtenberg, *The Right, the All Right, and the Good* (Book Review), 92 YALE L.J. 544 (1983) (reviewing S. SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM (1982)).

145. For the latest scholarly observations on the uses and abuses of judicial indirection, see Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) (Countervailing moral duty should "hardly ever" outweigh policy in favor of judicial honesty).